CONSIDERING MOM: MATERNITY AND THE MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY

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> "I tried to focus on the positive side. Of all the possible mothering paradigms I could count—birth mother, biological mother, child-raising mother, legally recognized mother—I would fill three of the roles. I had to settle for three-quarters his mother. That seemed like more than enough."[1]

I. INTRODUCTION

When a woman in California gave birth in early 2009 to octuplets due to the implantation of multiple cryopreserved embryos, many people began to debate the legal, ethical, medical, and practical issues relating to maternity in the twenty-first century.[2] Over the last decade, the ability of medical reproductive science to produce children by assisted reproductive technology ("ART") has forced society to focus on issues of maternity, whereas previously, only legal and social issues relating to paternity were matters of concern. Over a decade ago, a judge on the Arizona Appeals Court wrote that the issue of maternity "seems to present no great practical problem because maternal identity always seems to be a given fact."[3] The increased use of assisted reproductive technology in subsequent years has challenged Judge Gerber's confidence in 1995 that maternal identity is always a given fact. The 1999 edition of Black's Law Dictionary defined "mother" as "a woman who has given birth to or legally adopted a child."[4] Five years later the definition of mother was expanded to read: "a woman who has given birth to, provided the egg for, or legally adopted a child."[5] Other definitions of mother included biological mother, birth mother, genetic mother, gestational mother, intended mother, natural mother, and surrogate mother.[6]

In the age of assisted reproductive technology[7] and collaborative reproduction,[8] defining maternity is no longer as simple as it once was. It

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1. Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 30, 2008 (Magazine), at 42 (containing one woman's reflections on her use of a gestational surrogate to carry a child which was genetically that of herself and her husband).

2. *See* Betsy McKay, *In-Vitro Fertilization Limit Is Sought*, WALL ST. J., Mar. 3, 2009, at A3 (reporting that a Georgia bill introduced in response to the "Octomom" would limit the number of embryos that a doctor may implant in a woman to two).

3. Soos v. Super. Ct., 897 P.2d 1356, 1362 (Ariz. Ct. App. 1995) (Gerber, J., concurring).

4. BLACK'S LAW DICTIONARY 1031 (7th ed. 1999).

5. BLACK'S LAW DICTIONARY 1035 (8th ed. 2004).

6. *See id.* (listing other terms of "maternity" including adoptive mother, de facto mother, foster mother, godmother, psychological mother, and stepmother).

7. *See* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 19-20 (2008) (defining assisted reproductive technology as the use of any medical technology to cause pregnancy by means other than sexual intercourse).

8. *See* Alexa E. King, Comment, *Solomon Revisited: Assigning Parenthood in the*

is for that reason that the new American Bar Association Model Act Governing Assisted Reproductive Technology[9] ("Model Act") does not define "mother," but simply defines a parent of either gender as "an individual who has established a parent-child relationship under this act or other law,"[10] and defines parental rights and obligations in the specific context of various forms of reproductive technology.[11]

Until recent years, parentage cases typically involved issues relating to paternity. Since the birth mother was also the genetic mother it followed that she was also the legal mother and there was no practical reason to dispute maternity.[12] Of course, the idea of "mother" has always been subject to various shades of meaning based in large part on diverse cultural, political, and religious influences.[13] But with the development of assisted

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Context of Collaborative Reproduction, 5 UCLA WOMEN'S L.J. 329, 341 (1995) (describing collaborative reproduction as a form of assisted reproduction by which an individual other than one who is an intended parent provides either genetic materials or serves as a surrogate carrier).

9. *See generally* MODEL ACT GOVERNING ASSISTED REPROD. TECH. prefatory note (2008) (adopting the Act to create legal standards for the use and storage of gametes and embryos while addressing social concerns).

10. *Id.* § 102(25).

11. *See id.* prefatory note (noting that the ABA enacted the Model Act to give assisted reproductive technology participants guidance due to the lack of state legislation addressing the balance of interests of the intended parents, the gamete donors, the gestational carrier, and most importantly the child and family); *cf.* Laura A. Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW. 241, 244, 257-58 (1999) (describing that when states lack legislation on ART, case law often leaves gaps on parties' duties and responsibilities); Adam P. Plant, *With a Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancements*, 54 ALA. L. REV. 639, 655 (2003) (believing that legislation is the proper method for developing a legal framework on ART due to statutory safeguards that establish the responsibilities of all parties); Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185, 188 (2008) (urging a thorough discussion of ART in the Nebraska legislature due to a lack of debate during the passage of the surrogacy laws and recent technological advances); Christine A. Bjorkman, Note, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 167 (2008) (recommending that Connecticut reexamine the need for legislation regarding ART in light of changes in society and advances in medical technology).

12. *See In re* C.K.G., 173 S.W.3d 714, 721 (Tenn. 2005) (noting that historically, maternity was considered beyond doubt because the gestational mother was also the genetic mother).

13. *See* GERDA LERNER, THE CREATION OF FEMINIST CONSCIOUSNESS FROM THE MIDDLE AGES TO EIGHTEEN-SEVENTY 124-25 (1993) (noting the Christian idea of virginal motherhood embodied in Mary, the mother of Jesus); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 359-62 (1991) (describing the limitations in the definition of a parent in terms of biological, lexical, social and cultural definitions); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL. F. 353, 365 (2004) [hereinafter Polikoff, *Making Marriage Matter Less*] (explaining that at common law, a child born out of wedlock had no legal mother or father because he or

reproductive technology in recent decades, especially the growth of gestational surrogacy, the old verities are no longer simple to apply.[14] A comment in the Uniform Parentage Act of 2000 notes that with regard to the use of a gestational carrier to bear and deliver a child for the intended parents, "medical science has raced ahead of the law without heed to the views of the general public or legislators."[15] The absence of statutory law governing determination of maternity strongly suggests the need for clarifying legislation, particularly considering the rapid increase in the use of assisted reproduction over the past decade.[16] This article provides examples of the problems courts have encountered in determining maternity; it also examines how the Model Act could be used to disentangle the maternity rights issues arising in surrogacy and other assisted reproduction cases if the Act becomes law.

II. ANALYSIS

The best way to understand the impact which assisted reproduction has had on our thinking about maternity is to consider the various kinds of procreative choices now available to women because of this technology. The evolution of ART has not only revolutionized reproductive medicine, but has also created a novel set of legal questions. Many of these questions have not yet been answered in any commonly agreed upon manner and promise to continue to be raised in legal cases in the coming years. The options range from the traditional situation where the birth mother is also the legal mother, to the various forms of surrogacy which have separated birth from intended parenthood, the use of genetic tests for parenthood, the gradual development of intent as a basis for determining maternity, the sharing of maternity by female same-sex couples, to maternity after a mother's death. Each of these possibilities will be examined in this article.

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she was *filius nullius,* the child of no one); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 489, 493, 510 (1990) [hereinafter Polikoff, *This Child Does Have Two Mothers*] (advancing the idea that a new definition of paternity and maternity called psychological parenthood should be developed in place of traditional definitions based on biology or adoption).

14. *See, e.g.*, Krista Sirola, Comment, *Are You My Mother: Defending the Rights of Intended Parents in Gestation Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 160 (2006) (asserting that Pennsylvania's ruling in *J.F. v. D.B* indicates the popularity and trend of surrogacy arrangements as well as the need for a set of standards for resolving disputes).

15. UNIF. PARENTAGE ACT 2000 Art. 8 (amended 2002), 9B U.L.A. 362 (2001 & Supp. 2008).

16. *See* CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., NAT'L SUMMARY & FERTILITY CLINIC REPORTS, 2005, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 61 (2007) (reporting that between 1996 and 2005, the number of children born as the result of assisted reproductive technology in the United States increased by 150% from 20,840 to 52,041).

A. Motherhood and Surrogacy

Most of the legal controversy over maternity to date has arisen from the practice of surrogacy. This is understandable since typically a surrogacy arrangement constitutes a separation of birth from intended parenthood, which strikes directly at the traditional concept that giving birth equates to legal maternity. This section of the article will examine various aspects of this dilemma.

1. Maternity and the Birth Mother

Until recent decades maternity issues only rarely arose in legal disputes.[17] The obvious reason for the lack of parentage disputes involving maternity, outside of adoption situations, was based on the simple two-fold facts of reproductive biology, namely that (1) the legal mother was the birth mother and (2) she had a genetic connection to the child she had birthed.[18] Stated simply,

> [u]ntil very recently, determining a newborn's legal mother was relatively simple: when a pregnant woman gave birth to a child, it was irrefutable that she was the child's mother, the 'presumption of biology.' The ancient maxim *mater est quam gestation demonstrat* (by gestation the mother is demonstrated) illustrates this presumption.[19]

As late as the promulgation of the original Uniform Parentage Act in 1973, maternity was "established by proof of [a woman] having given birth,"[20] although, "or under this Act"[21] was added to the definition of maternity to deal with the potential rare case involving a parental challenge to the status of an alleged birth mother, as might happen when a hospital maternity clinic mixes up the identity of a child.

The federal law governing parentage, therefore, focused on paternity, taking maternal status for granted in light of gestation.[22] In fact, maternity was given such short shrift in the 1973 Uniform Parentage Act that it

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17. *See, e.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 771 (2006) (noting that a majority of states have enacted safe haven laws providing mothers that abandon their child with immunity from prosecution); Peter M. Warren, *O.C. Hospital Acts to End Baby Mix-Up*, L.A. TIMES, Feb. 23, 1999, at 1 (reporting that a hospital baby mix-up highlighted the need for an electronic security system despite the fact that baby mix-ups do not occur frequently).

18. *See* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood,* 39 SANTA CLARA L. REV. 79, 97 (1998) (contending that because historically gestation proved genetic parentage, there was never a need to distinguish between gestational and genetic mothers).

19. Sara K. Alexander, Note, *Who Is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature,* 38 GA. L. REV. 395, 397 (2003).

20. UNIF. PARENTAGE ACT (1973) § 3(1), 9B U.L.A. 391 (2001 & Supp. 2008).

21. *Id.* §§ 3(1), 11 (permitting blood testing to prove parentage).

22. *See* 42 U.S.C. § 666 (2006) (reporting that paternity can be established through genetic testing or voluntary acknowledgment).

contained no specific procedures for determining maternity other than stating that some of the paternity procedures could also be used to determine a "mother and child relationship."[23] This statutory focus on the determination of paternity was thus typical of the situation which existed before the widespread use of *in vitro* fertilization and gestational surrogacy.[24]

2. Maternity and Surrogacy

Establishing maternity by virtue of a woman giving birth was a rule of convenience which could be easily administered and applied in resolving disputes. The rule could also be easily applied to the rare cases in which maternal status became an issue. Before the development of assisted reproductive technologies, the law created a presumption that the birth mother was the legal mother.[25] The fact that the birth mother was also the genetic mother made that rule supportable as a matter of policy. Thus, in the first "traditional" surrogacy cases involving a dispute over maternity, the court could logically determine that the gestating woman was the legal mother because she was *both* the birth mother and the genetic mother.[26]

The most famous of such cases was the New Jersey Supreme Court decision *In re Baby M*, which involved a woman who conceived and gave birth to a child with the sperm of the intended father by intrauterine insemination which fertilized her egg.[27] After the birth of "Baby M" the birth mother claimed to also be the legal mother, even though the purpose of the surrogacy arrangement was to create a child for the father and his wife. An action was brought to enforce the surrogacy contract and the trial court granted the relief asked for, terminated the birth mother's maternal rights as provided in the agreement, and granted the father's wife a decree of adoption as the intended mother.[28] However, this judgment was

23. *See* UNIF. PARENTAGE ACT (1973) § 21, 9B U.L.A. 494 (2001 & Supp. 2008).

24. *See id.* § 21 cmt. (acknowledging that sections four to twenty of the U.P.A. were devoted to the ascertainment of paternity rather than maternity, but that a judge should apply the paternity sections to maternity disputes).

25. *See* Malina Coleman, *Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction,* 17 CARDOZO L. REV. 497, 524 (1996) (asserting that unless a statute modifies the rule, common law presumes the birth mother is the child's legal mother).

26. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 131 (2006) (defining "traditional surrogacy" as when the surrogate carrier is also the genetic mother, distinguishable from gestational agreements in which, by virtue of embryo implantation or transfer, the birth mother has no genetic connection to the child).

27. *See* 537 A.2d 1227, 1253 (N.J. 1988) (upholding the maternal rights of the traditional surrogate).

28. *See id.* at 1238, 1243 (stating that the lower court erred in applying the "best interest" standard because the standard is insufficient to terminate maternal rights).

reversed on appeal.[29] The New Jersey Supreme Court ruled that the birth mother was the legal mother of the child, not the contractual intended mother.[30] The *Baby M* decision was soon followed by a California decision in which a traditional surrogate carrier was held to be the legal mother of the child she had conceived with the intended father's sperm by intrauterine insemination pursuant to a surrogacy agreement, since she was both the birth mother and the genetic mother.[31] The New Jersey and California decisions in these cases suggested that the use of a traditional surrogate to produce a child for another woman was extremely risky since the courts might be unwilling to enforce the terms of a preconception surrogacy contract by waiving maternal rights when a surrogate carrier was both the birth mother and the genetic mother of the child.[32]

However justifiable, the early traditional surrogacy decisions were relying on a dual birth mother/genetic mother test. It quickly became apparent though that the test did not work in disputes involving gestational surrogacy contracts in which the gestational carrier had no genetic connection to the child. The development of embryo transfer technology created the potential for transferring an already fertilized egg provided by someone other than the birth mother.[33] In such cases a gestational carrier is a birth mother who has no genetic connection to the child she bears since the fertilized egg implanted in her was produced either by an egg donor or by the intended mother.[34]

Once gestational surrogacy became medically possible by embryo transfer, the issue of the maternal status of the birth mother came to the courts. A California Supreme Court decision, *Johnson v. Calvert*, involved a claim by a gestational carrier who gestated an egg carrying the genetic

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29. *See id.* at 1243 (stressing that a court cannot terminate maternal rights unless there is strong evidence of neglect or abandonment).

30. *See id.* at 1246 (nullifying the surrogacy contract partly because it contradicts the statute which limits a birth mother's ability to irrevocably consent to waiving her parental rights to one instance: surrendering custody to an approved agency or New Jersey's Divison of Youth and Family Services ("DYFS")).

31. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 901 (Cal. Ct. App. 1994) (ruling in a divorce matter that the husband and the traditional surrogate carrier, not the wife of the father, were parents of the child).

32. *See* Jami L. Zehr, Comment, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant?*, 20 LOY. CONSUMER L. REV. 294, 304-05 (2008) (noting that under the New Jersey Supreme Court's ruling, surrogate contracts where the surrogate carrier is birth and genetic mother may be upheld if the mother voluntarily agrees to the contract without payment).

33. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(11) (2008) (defining embryo transfer as "all medical and laboratory procedures that are necessary to effectuate the transfer of an embryo into the uterine cavity").

34. *See id.* § 102(16) (defining a gestational surrogate as "a woman into whom an embryo formed using eggs other than her own is transferred").

material of the intended parents.[35] The claim was disputed by the husband and wife who had hired her to gestate their embryo. Rejecting the view that the child could have two legal mothers, the California court ruled that the genetic mother (egg provider) who was also the intended mother under the surrogacy agreement was the legal mother.[36]

The result in the *Calvert* case was easier to reach when the birth mother was not a "traditional" surrogate carrier as she was in the *Baby M* case. But suppose neither the gestational carrier nor the intended mother is the genetic mother of the child.[37] An example is found in another California case, *In re Marriage of Buzzanca*, which, while technically involving the question of paternal child support, also necessarily implicated maternity when the trial judge erroneously ruled that the child had no legal parents.[38] In that case the intended parents (a divorcing husband and wife) had no genetic connection to the child because donated sperm and eggs were used to produce the embryo.[39] The surrogate carrier, who renounced any parental rights she may have had, also had no genetic connection to the child she had birthed.[40] In applying the principle that parentage in gestational surrogacy cases is determined by the intended parents who set the pregnancy in motion, the court determined that the husband and wife were the legal parents.[41]

As a result of the developing case law, what were previously mundane words began to assume particular importance. This importance is best illustrated by the changing statutory language used to describe the role of the birth mother in gestational surrogacy cases. Words such as "parent," "mother," and "father" became terms, which carried different meanings in relation to other statutes. Such words also began to embody both a legal

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35. *See* 851 P.2d 776, 778 (Cal. 1993) (concluding that the genetic mother is the natural, and also legal, mother of the child).

36. *Id. But see* Elisa B. v. Super. Ct., 117 P.3d 660, 677 (Cal. 2005) (qualifying the earlier view in *Johnson* that a child cannot have two legal mothers by ruling that a female domestic partner who encouraged her former partner to have a child by assisted reproduction could be held liable for child support).

37. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(19) (defining an "intended parent" as "an individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or collaborative reproduction").

38. *See* 72 Cal. Rptr. 2d 280, 293-94 (Cal. Ct. App. 1998) (reversing the trial court's determination as to parentage and finding that given their "initiating role as the intended parents in [the child's] conception and birth," Luanne and John Buzzanca are to be considered the lawful parents of the child to which they have no biological link).

39. *Id.* at 282.

40. *Id.*

41. *See id.* at 292 (asserting that a couples' inability to get pregnant does not preclude legal parenthood through surrogacy, as the couple still deliberately engages in "procreative conduct").

and social understanding of familial rights and obligations.[42] In discussing some of the early surrogacy cases, it is clear that gestational surrogacy has the advantage of avoiding the kinds of definitional problems inherent in traditional surrogacy when the birth mother is also the genetic mother.[43] But in a gestational surrogacy arrangement a woman may be the "birth mother," but not be either the "genetic mother" or the "intended mother," and this distinction may justify her not being treated as the "legal mother" in a state which does not apply the "birth mother" rule to determine maternity.

The first proposed uniform act on surrogacy, the Uniform Status of Children of Assisted Conception Act, proposed to qualify a carrier's maternity by use of the term "surrogate mother."[44] But there was a problem inherent in this phrase. The word "surrogate" is both demeaning and technically inaccurate since it can be interpreted to mean she is acting as a mere substitute for another.[45] But as the birth mother, such a woman is actually fulfilling a vital maternal role in carrying and giving birth to a child.[46] The next attempt to find a suitable name for the birth mother in surrogacy arrangements came with the proposal of the second version of the Uniform Parentage Act in 2000 (amended in 2002), which described the woman as a "gestational mother."[47] This description suggested that the birth mother is in fact a "mother," whether or not she is a "legal mother."[48]

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42. *See* Hill, *supra* note 13, at 362 (noting the implicit difficulty of formalistically defining "parent," "mother," and "father" because such definitions would omit social, legal, and moral considerations pertinent to the social construction of parenthood as an institution).

43. *See id.* at 371-72 (comparing court decisions providing genetic donors and intended parents custody when a surrogate reneged on pre-birth agreements under state laws creating an irrebuttable presumption of motherhood in favor of birth mothers).

44. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION Act § 1(4), 9C U.L.A. 363 (2001 & Supp. 2008) (defining "surrogate" as "an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents"). The Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1988, but was withdrawn by the Commissioners in favor of the Unif. Parentage Act (2000). *See* UNIF. PARENTAGE ACT (2000), prefatory comment, 9B U.L.A. 360 (2001 & Supp. 2008) (noting that with the promulgation of the Unif. Parentage Act, all prior uniform acts dealing with parentage issues were withdrawn).

45. *See* UNIF. PARENTAGE ACT 2000 Art. 8 cmt. (amended 2002), 9B U.L.A. 360, 360-61 (2001 & Supp. 2008); *see also* Hill, *supra* note 13, at 367-68 (highlighting the divergent interpretations of the rights afforded to surrogate mothers, ranging from none to full parental rights).

46. *See* Johnson v. Calvert, 851 P.2d 776, 797 (Kennard, J., dissenting) ("[t]he majority recognizes no meaningful contribution by a woman who agrees to carry a fetus to term for the genetic mother beyond that of mere employment to perform a specified biological function . . . . [A] pregnant woman's commitment to the unborn child she carries in not just physical; it is psychological and emotional as well.").

47. UNIF. PARENTAGE ACT (2000) Art. 8 (amended 2002), 9B U.L.A. 362 (2001 & Supp. 2008).

48. *See id.* (omitting the use of mother for the intended female parent while referring to the gestational mother as "mother" in stating the requirement that either she

The A.B.A. Model Act clarifies this language by referring to a woman who births a child for another as a "gestational carrier" rather than a "gestational mother."[49] Yet, while the Model Act terminology is clearer, it also may cause some confusion in the light of the prior case law, discussed above, by including within the definition of gestational carrier both a traditional surrogate and a gestational surrogate.[50] This reflects the view common among lawyers practicing in the assisted reproduction field that there should not be a distinction between traditional or gestational carriers and that both groups should simply be treated as a single group apart from the intended parents.[51] In the absence of legislation such as the Model Act, it is likely that some courts will continue to draw distinction between traditional and gestational carriers in resolving maternity issues.

3. Alternative Surrogacy Arrangements

Having noted the distinctions discussed above, an optional form of surrogacy made available under the Model Act needs further analysis. The Model Act proposes in Article 7 that a state may consider either a form of surrogacy which provides for judicial approval of an agreement (called "Alternative A"), or a form of surrogacy effectuated by a self-executing contract (called "Alternative B").[52] Either alternative has an advantage over the absence of any specific law for determining maternity in surrogacy cases, which unfortunately characterizes the current law in most states. Alternative A is adopted from the Uniform Parentage Act.[53] Alternative B is derived from the language of the Illinois Gestational Carrier Act[54] and provides specific requirements which must be met before a gestational carrier agreement becomes a self-executing contract. The contract serves to establish that the intended parents have legal parentage and that the gestational carrier has no maternal interests.[55] However, under Alternative

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or the intended parents reside within the state for at least ninety days).

49. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(16) (2008).

50. *Id.* (defining a gestational carrier as "an adult woman, not an intended parent, who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child").

51. *See* Hill, *supra* note 13, at 370-71 (noting that courts' application of the term "biology" in maternity suits can be equivocal because it implicates the tension between genetic and gestational procreation).

52. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703 (providing divergent requirements for "Alternative A" and "Alternative B" gestational agreements).

53. UNIF. PARENTAGE ACT (2000) Art. 8 §§ 801-03 (amended 2002), 9B U.L.A. 363-64 (2001 & Supp. 2008).

54. ILL. COMP. STAT § 47/5 (2009).

55. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 701 (providing that when the contract complies with the provisions of the law, the intended parents immediately become the legal parents upon the birth of the child, immediately have the right to custody upon birth, and neither the gestational carrier nor her legal spouse have any

B, at least one of the intended parents must have contributed a gamete to the embryo that the carrier is to gestate, which reduces the danger of the situation like that in *In Re Marriage of Buzzanca,* in which neither the intended mother or the gestational carrier had any connection to the child.[56] For this reason, the Model Act contains the following definition of "gestational carrier arrangement," applicable only to Alternative B: "the process by which a woman attempts to carry and give birth to a child created by in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational carrier has made no genetic contribution."[57]

4. Surrogacy and the Birth Mother Test

A decision of the Superior Court of Pennsylvania illustrates the problem with relying on the traditional birth mother test to determine legal maternity.[58] A male professor in Ohio, who lived with but was not married to an infertile woman wished to have a child and contacted an Indiana surrogacy agency.[59] His female companion sold her dental practice in anticipation of adopting and raising any children produced by surrogacy.[60] The agency put the professor in contact with a married woman in Pennsylvania who would serve as a gestational surrogate carrier in return for a payment of $15,000 or $20,000 in case of a multiple birth.[61] A single woman in Texas provided the eggs which were fertilized with the professor's sperm.[62] The professor, his companion, the surrogate carrier, her husband, and the egg donor all signed a surrogacy agreement, recognizing the professor as the father.[63] The surrogate carrier gave birth to triplets, then decided to keep the children, and left the hospital with the triplets. The father then brought an action against the gestational carrier to obtain sole custody of the children.[64] The trial court ruled that the gestational carrier "assumed maternity" and was the "legal mother" of the children, being "more a mother and a parent by her actions than by

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parental rights on the birth of the child).

56. 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (explaining that the Buzzancas had an embryo implanted in a surrogate mother that did not share their genetic material).

57. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(17).

58. *See* J.F. v. D.B., 897 A.2d 1261, 1280 (Pa. Super. Ct. 2006).

59. *Id.* at 1265.

60. *Id.* at 1266.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1270.

genetics."[65] The Pennsylvania Superior Court, however, later awarded the genetic father full physical and legal custody of the children, ruling that the surrogate carrier had no legal parental rights.[66] This sad case in which the parental status of three children went unresolved for the length of a prolonged litigation, suggests the need for statutory clarity on the issue of the maternity rights, if any, of a woman who agrees to become pregnant and give birth for others who are intended parents without the need to have judges balancing birth, intent, genetics and other factors in order to resolve the case.[67]

5. The Genetic Connection Test for Maternity

In paternity cases, the ability to determine a genetic connection between a putative father and a child has caused the court system to become almost totally dependent on the use of genetic marker testing.[68] Paradoxically, while paternity cases are focused on genetic parenthood, maternity cases have begun to put less emphasis on birth or genetics than on the social needs of the child and the diverse nature of modern family life.[69] A decision of the Supreme Court of Tennessee illustrates both the potential complexity of the maternity issue and the need to consider all of the competing factors in reaching a decision.[70] A heterosexual couple, Charles

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65. *Id.* at 1280 (noting that the trial court cited no case or statutory law to support its conclusion that the gestational mother was the legal mother); *see also* Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach Legislatures About the Need to Enact Article 8 of the* Uniform Parentage Act *(2000),* 56 CLEV. ST. L. REV. 1, 33 (2008) (raising the issue of whether such cases can help educate legislatures about the need for statutory enactments dealing with surrogacy).

66. *J.F. v. D.B.*, 897 A.2d at 1281 (determining that the genetic father should have custody due to disapproval of the gestational carrier's behavior and in the interests of the children's need for a stable familial situation); *see also* J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio Ct. App. 2006) (holding that the father had a right to recover by indemnification the money he had paid to the birth mother/surrogate carrier as provided in the surrogacy contract when she breached the contract by keeping the children).

67. *See J.F. v. D.B.*, 897 A.2d at 1270-71 (providing the procedural history of the case that spanned over three years whereby the father lost custody, then obtained partial custody, before finally receiving full custody of his children); *see also* Rains, *supra* note 65, at 33 (discussing the dissatisfaction of both the Ohio and Pennsylvania judges regarding the legal ambiguity evident in surrogacy and calling on state legislatures to unequivocally address parental determinations).

68. See Hill, *supra* note 13, at 381 (illuminating the factors that the law generally uses to define fatherhood: "the man's biological relationship with the child, his legal or social relationship with the child's mother, and the extent of his social and psychological commitment to the child.").

69. *See, e.g.*, *In re* C.K.G., 173 S.W.3d 714, 733 (Tenn. 2005) (noting the complex public policy issues arising from technological advances and non-traditional familial arrangements).

70. *See id.* at 730 (clarifying that the complexity of the case would not control other ambiguous situations determining legal motherhood, including conflicts between a gestational carrier and an egg donor, as well as those involving a gestational carrier and a genetically-unrelated but intended mother).

and Cindy, had an on-again, off-again relationship, but finally decided to have a child. Cindy had children and grandchildren from prior relationships, but was concerned about the viability of her eggs because of her age (forty-five).[71] The couple therefore sought to conceive by the use of donor eggs which were fertilized *in vitro* by Charles's sperm; Cindy thereafter gave birth to triplets.[72] The couple signed a form provided by the clinic they had consulted which consented to the use of eggs of an anonymous donor and which included an agreement that Cindy would be the "mother" of any children created by the procedure.[73] When the relationship between the couple deteriorated and personal and financial disputes arose between them, Cindy sued to establish Charles's paternity and to obtain custody and child support.[74] Charles defended against the suit by challenging the legal maternity of Cindy based on the fact that she had no genetic connection to the children.[75] The Tennessee court noted that a prior decision, involving a divorce case where the parties disagreed over the disposition of cryopreserved embryos produced by both of their genetic contributions,[76] should not be interpreted to mean that only the interests of genetic parents should be protected by law. In determining the legal maternity of Cindy in this case, the court considered a number of other factors even in the absence of a genetic maternal connection. These factors include the intent of the parties to become parents by assisted reproduction, the woman's reason for serving as the gestator of the children, and the waiver of any maternal rights by the egg donor.[77] In so ruling, the Tennessee court rejected Charles' argument that Cindy, in lacking a genetic connection to the children, was a mere gestational surrogate for him and not a legal mother.[78] In the circumstances of this

71. *See id.* at 717.

72. *See id.* at 718 (explaining that one of the two embryos implanted divided to facilitate the eventual creation of three fetuses).

73. *See id.* at 717 (illuminating the problematic nature of standardized contract forms, as the man and woman in this case were not married, but were nevertheless describes as "husband" and "wife" in the agreement).

74. *See id.* at 719.

75. *See id.* at 720 (revealing that Charles sought to obtain sole and exclusive custody of the triplets).

76. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (asserting that both the genetic mother and genetic father have a right to determine use of their genetic materials in the embryos, but that conflicting choices have to be resolved either by contract or in favor of person seeking to avoid parenthood).

77. *See In re C.K.G.*, 173 S.W.3d at 727-30 (reasoning that parental and gestational carrier intent comports with the policy considerations in Tennessee's familial relations statutes, but legal agreements waiving parental rights should be respected by the courts).

78. *See id.* at 733 (determining that Cindy and Charles voluntarily agreed that she would serve as the legal mother, Cindy performed the gestational act, and that this case did not implicate the controversies that arise when the gestator and genetic progenitor

case, Cindy's role as a birth mother/intended mother weighed the equities heavily in her favor.[79]

6. Maternity Under State Surrogacy Statutes

As of the time of the composition of this article no state had enacted the A.B.A. Model Act. As discussed below, however, some states have enacted statutes which govern the use of surrogacy and the maternal status of the surrogate carrier. The problem which the Model Act would clarify is illustrated by the highly diverse array of current statutory law dealing with surrogacy.

An Arizona statute provides that a surrogate "is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child."[80] When applying the statute to a genetic mother who provides her fertilized egg to a surrogate—since she herself could not gestate the pre-embryo—the Arizona appellate court, however, declared the statute unconstitutional. The court ruled that in denying the genetic mother equal protection of the laws by declaring the birth mother (surrogate carrier) to be the legal mother, the statute treated the genetic mother differently from the genetic father.[81] The statute has not been repealed in Arizona and perhaps could be construed differently in a challenge involving a claim of maternity made by an intended mother who contracted with a gestational carrier to carry a child produced by use of a donated egg. A few other states have enacted statutes which, by banning enforcement of surrogacy contracts, would presumably treat the surrogate-birth mother as the legal mother of the child.[82] Some states have banned the most common form of surrogacy in which the surrogate is paid a fee for her services,[83]

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are two different women).

79. *See id.* at 730 (reasoning that because Cindy held both the roles of progenitor and gestator, she fulfilled two of the three factors required to determine legal motherhood, rendering the third factor, whether the roles were separate, moot).

80. ARIZ. REV. STAT. ANN. § 25-218(D) (2009) (defining a surrogate as a woman, who under contract, agrees to relinquish her parental rights to a child either if the child is not genetically related to her or if conceived naturally or by artificial insemination).

81. *See* Soos v. Super. Ct., 897 P.2d 1356, 1361 (Ariz. Ct. App. 1995) (disapproving of the fact that the father is afforded a procedure for proving paternity under the statute, but the mother is not afforded a procedure for proving maternity).

82. *See, e.g.*, FLA. STAT. § 742.15 (2009) (requiring that a commissioning couple agree to pay reasonable living, legal, psychological and psychiatric expenses and that a gestational surrogate must agree to assume maternal rights and responsibilities if neither member of the commissioning couple is a genetic parent of the child); IND. CODE § 31-20-1-1 (2008) (prohibiting enforcement of any agreement by a surrogate to surrender her parental rights or duties); MICH. COMP. LAWS § 722.855 (2008) (criminalizing surrogacy arrangements); N.D. CENT. CODE, § 14-18-05 (2008) (establishing the surrogate as the legal mother of the child); N.Y. DOM. REL. LAW § 122 (McKinney 2009) (declaring surrogacy contrary to public policy).

83. *See* KY. REV. STAT. ANN. § 199.590 (West 2008) (voiding contracts involving the termination of parental rights in exchange for compensation); LA. REV. STAT. ANN.

and by doing so have effectively banned most arrangements by which an intended mother can achieve maternity by use of a gestational carrier to bear her child. In other states there are statutes which recognize surrogacy, and the intended mother is recognized as the legal mother rather than the surrogate carrier.[84] Similarly, in some states, the law does not attempt to define maternal rights arising from surrogacy, but by explicitly eliminating surrogacy from the provisions of the state's baby-selling statutes, the states impliedly suggest that a court decision could treat the intended mother as the legal mother.[85] Although a few states have considered legislation providing for greater regulation over gamete donation,[86] there is little law regulating assisted reproduction in the United States. Few states, as discussed above, have statutes dealing specifically with maternity in a surrogacy context, which then forces courts to resolve disputes in a legal void. Courts have therefore handled these issues on a case-by-case, and not always consistent, basis.[87]

The Model Act Governing Assisted Reproductive Technology would provide a potential statutory basis for resolving maternity issues which arise in the context of surrogacy in place of the current spate of conflicting laws. The Act attempts to minimize the potential semantic confusion about maternity by eliminating the word "mother" and describing the birth

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§ 9:2713 (2008) (voiding contracts that provide for a valuable consideration to a surrogate); NEV. REV. STAT. § 126.045(3) (2008) (prohibiting the payment of money or anything of value except medical and necessary living expenses to surrogate while not specifying if this affects parentage rights); WASH. REV. CODE § 26.26.210 (West 2009) (prohibiting compensation to surrogate except for reasonable medical and legal expenses). Banning compensated surrogacy by statute makes unenforceable most surrogacy arrangements since most women are unwilling to undergo nine months of pregnancy without compensation and are unwilling to assume the risk that they may be legally liable for parentage of a child they are agreeing to carry for others. Except in a rare case such as an inter-family unpaid surrogacy arrangement such as a sister serving a surrogate carrier for her infertile sister, banning compensation either eliminates surrogacy or results in "under the table" payments and/or false legal pleadings to procure approval of the arrangement.

84. *See* KINDREGAN & MCBRIEN, *supra* note 26, at 146-82 (explaining why the statutory laws of Arkansas, Illinois, New Hampshire, Utah, Virginia, and Washington could be interpreted as creating maternal rights in the intended mother rather than the surrogate).

85. *See* ALA. CODE, § 26-10A-34(a)-(b) (West 2009); IOWA CODE ANN., § 710.11 (West 2009); W. VA. CODE, § 48-22-803(e)(3) (2008).

86. *See* Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation,* 21 J.L. & HEALTH 1, 10-11 (2008) (noting unsuccessful attempts to pass legislation in a few states).

87. *See, e.g.*, Culliton v. Beth Isr. Deaconess Med. Ctr. 756 N.E.2d 1133, 1140 (Mass. 2001) (allowing pre-birth orders to determine maternity of child scheduled to be born to a surrogate carrier). *Contra* A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (disallowing a pre-birth order for termination of a surrogate carrier's parental rights and noting that after birth, the carrier may decide in seventy-two hours whether or not to surrender the child since the birth certificate need not be prepared, and list the parents, until forty-eight hours after that).

mother as a "gestational carrier."[88] A gestational carrier is defined as

> [A]n adult woman, not an intended parent, who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child. Both a traditional surrogate (a woman who undergoes insemination and fertilization of her own eggs *in vitro*) and a gestational surrogate (a woman into whom an embryo formed using an egg other than her own is transferred) are gestational carriers.[89]

This language is superior to earlier proposals and most existing state laws since it eliminates both the word "surrogate" and the word "mother" which may suggest a legal parent-child relationship which in fact is nullified by the gestational agreement.[90] From a terminology perspective, none of these proposals are perfect and in fact reflect the doubts which have been raised in various legal decisions about the status of the birth mother. The truth of the matter is that the status of the birth mother does, and should depend on a combination of factors, including the context in which the question about the interests of the birth mother is asked, the specific waivers and rights contained in the surrogacy arrangements, and the requirements of applicable statutory law, regulatory law, and case law. Despite these legal vagaries, the Model Act is a step toward recognizing the reality of the maternal statuses of both the woman who gives birth to the child and the intended mother for whom the former gestates the child.

7. Controversies in Gestational Surrogacy

The Model Act states that except as otherwise provided "the woman who gives birth to a child is presumed to be the mother of that child for purposes of state law."[91] The exception to this principle is, of course, the status of the gestational carrier who gives birth but does so for others, and is not the legal mother if the state recognizes surrogacy.[92] But one might ask: if the gestational carrier receives a fee for gestating a child which is to be turned over to another, how does this differ from baby-selling? It may be rationalized that statutes prohibiting baby-selling were enacted in conjunction with adoption laws to prevent the black-marketing of children.[93] Defenders of surrogacy would counter-argue that if

88. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(16) (2008).

89. *Id.*

90. *See id.* § 102(15) (clarifying that a gestational agreement is a "contract between intended parents and a gestational carrier intended to result in a live birth").

91. *Id.* § 701(1).

92. *See id.* § 102(16) (defining gestational carrier as an adult woman who enters into an agreement to bear a child to which she is not the intended parent).

93. *See* Bjorkman, *supra* note 11, at 148 (arguing the surrogacy process in assisted reproductive technologies is often perceived to be similar to baby-selling due to the exchange of money between the intended parents and surrogate mother in consideration for a child); *see also* Richard R. Carlson, *Transnational Adoption of Children*, 23

compensation is not allowed it would either end the practice of surrogacy except in a very few cases or else would drive the payment of fees underground.[94] Although there is no persuasive evidence, this may be happening in Canada which now bans compensated surrogacy, where persons seeking surrogacy services may seek help from United States providers or may just make "off the record" or "under the table" payments.[95] The Model Act forthrightly takes the position that "consideration, if any, paid to a donor or prospective gestational carrier must be reasonable and negotiated in good faith between the parties,"[96] but may not be "conditioned upon the purported quality or genome-related traits of the gametes or embryos"[97] or on "actual genotopic or phenotypic characteristics of the donor or of the child."[98] The Model Act defines "compensation" as "payment of any valuable consideration for time, effort, pain, and/or risk to health in excess of reasonable medical and ancillary costs."[99] If the Model Act were adopted in a particular state, this definition could be read as avoiding the baby-selling provisions of an adoption statute since the compensation as a matter of law would not be for the transfer of the baby but for the gestational carrier's time, effort, pain, and risk to health over and above any costs for such things as "medical, legal, or other professional services."[100]

Another aspect of the contradictions created by gestational surrogacy is the argument that it is "renting of the womb and this sale exploits women because it is akin to prostitution . . . . [As in prostitution] where a woman sells her sexual services, a surrogate sells her reproductive services for a fee."[101] Stated another way, this argument revolves around the question of

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TULSA L. J. 317, 370 (1988) (noting that the widespread concern alleging black market baby schemes contributes to the states' reluctance to relinquish their authority to decide a child's adoptability).

94. *See* Bjorkman, *supra* note 11, at 148-49 (highlighting that most women are unwilling to give up an entire year of their lives without some form of compensation for their services and that many supporters of surrogacy view that a woman should have freedom of choice over what she decides to do with her body).

95. *See* The Assisted Human Reproduction Act, 2004 S.C., ch.2 (Can.).

96. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 802(1) (2008).

97. *Id.* § 802(2).

98. *Id.* § 802(3) (arguing that the provisions regarding conditioning of compensation in §§ 802(2) and 802(3) have primary application to gamete donors rather than gestational carriers, except when the carrier is also the egg provider, commonly called "traditional surrogacy").

99. *Id.* § 102(6).

100. *See id.* at Alternative B, § 703(4)(d) (highlighting that a gestational agreement is enforceable if the agreement reimburses the gestational carrier for reasonable expenses).

101. *See* Zehr, *supra* note 32, at 314-15 (discussing that opponents to surrogacy argue that poor women will "flock" to become surrogates to make money and that there is no real choice for these women because it is either to stay poor or to be exploited).

a typically poor woman providing birth mothering services for typically wealthier people.[102] There have been reports of wealthier North American and European women in effect off-shoring their pregnancies by hiring poor women in India as gestational carriers.[103] It can be argued that this is exploitation of poor Indian women, but counter-argued that they choose to do so since they can make much more money (by the standards of India) than by any other employment and do so in a medically secure environment.[104] The issue of exploitation versus economic opportunity is one which cannot be resolved by the Model Act and would probably require international and treaty agreements to either ban the practice or put safeguards in place to insure that these birth mothers are protected.

B. Maternity and Female Same-Sex Couples

The language of the law has increasingly become gender neutral in the last decade. This trend is reflected in such proposals as the A.B.A. Model Act Governing Assisted Reproductive Technology, which employs words such as "individual,"[105] "parent,"[106] "donor,"[107] or "legal spouse,"[108] rather than terms designating a gender. There are exceptions for cases where a gender designation is appropriate, but for the most part gender neutrality is appropriate when possible in a contemporary statute.

The need to rethink common concepts of maternity might best be seen in the context of mothering claims asserted in disputes among parties to

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102. *See* Thomas Frank, *Rent-a-Womb Is Where Market Logic Leads*, WALL ST. J., Dec. 10, 2008, at A17 (describing the wife of a hedge-fund billionaire who documented her experiences with a surrogate; the surrogate's own daughter also acts as a surrogate and is using the proceeds to pay for college); Cheryl Miller, *Outsourcing Childbirth*, WALL ST. J., Apr. 25, 2008, at W11 (noting that some surrogacy agencies in the U.S. encourage their clients to give their surrogates the "princess treatment" and lavish them with gifts, but also noting that there are no shortage of surrogacy scams, citing a South Carolina woman who cheated couples out of $14,000).

103. *See* Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9 (reporting that the average cost for surrogate mothers in India is around $25,000, approximately one-third price in the United States).

104. *See id.* (describing that couples which perform off-shoring argue that they are not exploiting Indian women due to the abject poverty that they live in and the benefits that they receive as a result of the surrogacy).

105. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 604 (2008) (dealing with consent by an "individual" and eliminating the term of consent by a "woman and a man" used by the Uniform Parentage Act of 2000).

106. *See id.* at Alternative A, § 701(2) (defining gestational agreement as referring to "intended parents" and eliminates the words "man and the woman" used in the in the Uniform Parentage Act of 2000).

107. *See id.* § 102(9) (defining a donor as "an individual who produces eggs or sperm used for assisted reproduction," avoiding any distinction as to the gender of the donor).

108. *See id.* § 102(21) (attempting to avoid entanglement with the gender issues arising from the same-sex marriage controversy by defining a legal spouse in terms of gender-neutral legal relationships "substantially equivalent" to marriage).

former same-sex female relationships.[109] Susan F. Appleton noted that in regard to once-common stereotypes of parentage, "new laws governing same-sex couples take the next step, establishing apparently gender-neutral parentage rules."[110] Except when adoption is an option, lesbian couples who wish to have children must of necessity use assisted reproductive technology. "[T]here is no dispute that many gay and lesbian couples are having children through ART, so that one partner will have a genetic tie to their offspring."[111] The growing number of reported decisions involving lesbian couples reflects a serious struggle to develop law which can serve both the interest of the adult parties and the best interests of their children conceived by assisted reproduction.[112]

1. The Need for Statutory Clarity, Evidenced by Inconsistencies in Case Law

In the absence of any controlling law such as that reflected in the Model Act, issues of maternity which arise in same-sex unions have been decided differently by different courts.[113] Where same-sex unions are accorded legal recognition as marriages,[114] civil unions, or domestic partnerships,[115]

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109. *See* Polikoff, *This Child Does Have Two Mothers*, *supra* note 13, at 483 (suggesting that the current doctrines used to establish parenthood have created "gross" inconsistent results across state lines).

110. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-sex Couples Era*, 86 B.U. L. REV. 227, 240 (2006).

111. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 33 (2008).

112. *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1064 (Mass. 2006) (questioning if a former partner of a same-sex couple can assert custody and support rights for a non-biological minor child as a "de facto parent"); E.N.O. v. L.M.M., 711 N.W.2d 886, 888 (Mass. 1999) (deciding whether visitation rights are in the best interest of a child when a same-sex couple ends their relationship and the biological mother keeps the child). *See generally* Polikoff, *This Child Does Have Two Mothers*, *supra* note 13, at 459 (suggesting that an expanded definition of parenthood is needed that protects parental autonomy while serving the best interests of children).

113. *See* Polikoff, *This Child Does Have Two Mothers*, *supra* note 13, at 482 (arguing that the philosophical divide between state courts and within the Supreme Court reflects the tension between accepting the realities of the complexities of the modern family and trying to maintain a fictional account of familial homogeneity).

114. *See generally In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (striking down state bans on same-sex marriage as unconstitutional), *superceded by referendum,* CAL. CONST. art. 1, § 7.5 (2008) (declaring that "[o]nly marriage between a man and a woman is valid or recognized in California"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't. of Pub. Health, 789 N.E.2d 941 (Mass. 2003). The three preceding cases each struck down a state's ban on same-sex marriage as unconstitutional. Vermont, New Hampshire, and Maine have enacted legislation approving same-sex marriage and eliminating civil unions when the marriage law becomes effective. The California decision in *In re Marriage Cases* was later overturned by the Proposition 8 referendum approved by voters on November 4, 2008, amending California state constitution to prohibit recognition of same-sex marriages. In Strauss v. Horton, 207 P.3d 48 (Cal. 2009), the Supreme Court of California upheld the referendum, but recognized as legal

the Model Act would define the partners as legal spouses. This means that each of the partners is "an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage."[116] Under the Model Act, both of the female legal spouses in such a relationship will be considered the legal parents of a child born to one of them by assisted reproduction, except in certain well-defined circumstances.[117] This contrasts with the .Uniform Parentage Act which applies presumptive parenthood only on a male.[118] If the Model Act becomes law then in a state with a civil union or domestic partnership law, the female partners would both be treated as the presumptive dual mothers of a child born to one of them without the need to consider other factors.[119]

It may be possible for the same-sex partner of a birth mother to be treated as a mother under a statutory interpretation[120] or under some other legal theory such as *de facto* parenthood[121] even in the absence of marriage

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the same-sex marriages which were formalized prior to the referendum.

115. *See generally* Keith R. Richburg, *Vermont Lifts Drive for Gay Marriage*, SEATTLE TIMES, Apr. 8, 2009, at A1 (noting that same-sex civil unions or domestic partnerships are legal in California, the District of Columbia, Hawaii, Maine, New Jersey, New Hampshire, Oregon, and Washington).

116. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(21) (2008).

117. *See id.* § 605 (providing for a two year window for a legal spouse to challenge parentage of a child born to the other spouse except in cases where the court finds that the legal spouse did not consent to assisted reproduction or provide gametes, or the legal spouses have not cohabited since the assisted reproduction and the legal spouse never openly held out the child as his or her own).

118. *See* UNIF. PARENTAGE ACT (2000) § 204, 9B U.L.A. 311 (2001 & Supp. 2008) (creating a presumption of paternity based on marriage, consent to be the father, or cohabitation with the child for two years after birth combined with a holding out that the child is his own).

119. *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006) (ruling that in a dissolution of a civil union the partner of the biological mother whose child was conceived by artificial insemination during the union was also the mother of the child). The court, however, did not rely exclusively on the civil union status, but also considered the intention of the parties, the partner's participation in prenatal care and birth, and the birth mother's identification of the partner as a parent. The court stated that the partner in a female-female civil union should be treated the same as the male partner to a heterosexual marriage, where by statute, the husband is presumed to be the father of a child conceived by artificial insemination. *Id.* at 970. The Model Act would activate this conclusion and not make it dependent on inference.

120. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660, 670 (Cal. 2005) (interpreting California statute, Fam. Code., § 7611, which creates a presumption of paternity if a man receives a child into his home and openly holds it out as his natural child, as applying to a female same-sex unmarried partner who encouraged the mother to undergo assisted reproduction and treated the child as her own for purposes of determining that she had a child support obligation).

121. *See, e.g.*, E.N.O. v. L.L.M., 711 N.E.2d 886, 892-93 (Mass. 1999) (holding that the female partner in a long-term unmarried relationship with a woman who became pregnant by assisted reproduction and who jointly raised the child for four years was a *de facto* parent entitled to seek visitation with the child, but distinguishing *de facto* parenthood from full parental rights).

or a civil union. A statute clarifying the matter is clearly the most effective method of imposing parental rights and responsibilities. The difficulty with current case law is that it does not reflect a secure basis in law to insure the child's best interests and is so fact-intensive that it cannot produce universally appropriate results.[122] The Model Act, on the other hand, would provide a window for "parenthood by consent" when same-sex partners jointly agree to have a child by one of them using assisted reproduction. The Model Act provides that the partner who either provides gametes to the birth mother or consents to the use of assisted reproduction with the intent to become a parent is a parent of the resulting child.[123] The consent of the non-birth mother must be in a signed record.[124] Even in the absence of written consent, however, the non-birth mother partner may be ruled to be a parent when the birth mother and the non-birth mother cohabited in the same household with the child and openly held out the child as their own during the first two years of the child's life.[125]

2. Dual Maternity by Adoption in Same-Sex Unions

Lawyers sometimes counsel the non-parent in a same-sex relationship that the safest way to insure parental rights for both caregivers of a child conceived by assisted reproduction is to adopt the child.[126] In many cases, however, this does not happen because with the child in the crib and the adult relationship seemingly strong, the expense and complication of adoption appears to be unnecessary.[127] But if the partnership ends and the birth parent cuts off visitation of the child by her former partner, the latter may be in a poor position to assert some sort of *de facto* claim for contact

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122. *See* A.H. v. M.P., 857 N.E.2d 1061, 1073 (Mass. 2006) (declining to treat a former same-sex partner of the birth mother of a child of assisted conception as a legal mother, since her primary contributions to the child were financial support rather than actual involvement in raising the child, as she had failed to adopt the child when she had an opportunity to do so); T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) (declining to treat the birth mother's former same-sex partner as a legal mother where they had planned the conception and birth of the child in a co-parenting agreement and the adult relationship ended before the birth, ruling that the former partner was neither a *de facto* parent nor an equitable parent).

123. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603 (2008).

124. *Cf. id.* § 604(1) (stating that because a donor who provides gametes for the use of the intended parents is not a parent, the donor's individual's written consent is not needed).

125. *Id.* § 604(2).

126. *See* Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 13 (2008) (listing the various ways same-sex couples are able to create a family, including the adoption of a biological child with assistance of a surrogate or by the other partner).

127. *See* Polikoff, *This Child Does Have Two Mothers*, *supra* note 13, at 470 (highlighting the various difficulties lesbian couples have in arranging for the non-biological partner to adopt the biological partner's child).

with the child.[128] It should be noted that adoption may not be a guaranteed solution to this problem.[129] While some states have no law either prohibiting or permitting adoption by same-sex couples, a few states expressly prohibit the practice of second-parent adoption.[130] Some states have by court decision[131] or statute[132] allowed second parent adoption by same-sex couples, but many have not resolved the issue of recognizing such judgments entered in other states[133] or they have even prohibited such recognition.[134] Given this mixed history, reliance on adoption to cement a legal maternal relationship would be ill-advised.

C. The Deceased Mother

Until the development of assisted reproduction it was impossible for a woman to have a child after death, but the potential for posthumous reproduction has now been created by the ability to preserve embryos or even eggs produced during the lifetime of the biological mother or

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128. *See id.* at 463-64 (arguing that in case of a break-up between a same-sex couple with a child, the court is ill-prepared to resolve disputes and recognize the relationship's existence).

129. See COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW ch. 5, 1 (2008), for a thoughtful summary of adoption in same-sex unions.

130. *Compare In re* Adoption of Doe, 2008 WL 5070056, at *33 (Fla. Cir. Ct. Aug. 29, 2008) (declaring a Florida statute unconstitutional because it banned second parent adoption in the context of same-sex unions), *with* MISS. CODE ANN., § 93-17-3(5) (2007) (prohibiting adoption by a same-sex couple), *and* UTAH CODE ANN., § 78B-6-115 (2008) (banning second-parent adoption implicitly by prohibiting non-marital cohabitation).

131. *Compare* Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (affirming joint adoption of child by the birth mother and her female partner who were in a non-marital same-sex union), *and In re* K.M. 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (finding that the statute does not bar second parent adoption because nothing in the statute specifically excludes it), *and* Sharon S. v. Super. Ct. 73 P.3d 554, 574 (Cal. 2003) (concluding that same sex couples not registered as domestic partners are not barred from second parent adoption), *with In re* Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994) (ruling that second parent adoption is not allowed even if the trial court found it to be in the child's best interests), *and In re* Adoption of Luke, 640 N.W.2d 374, 382-83 (Neb. 2002) (interpreting the Nebraska adoption statute as not authorizing adoption by unmarried persons involved in a same-sex relationship because the natural mother would not surrender her maternal rights).

132. *See* VT. STAT. ANN. tit. 15A, § 1-102(b) (2009) (allowing adoption of a child with the mother's permission without the need for the natural parent to terminate her parental rights).

133. *See generally* Wasserman, *supra* note 126, at 10-12 (reviewing different states' treatment regarding recognition of judgments allowing same-sex partner adoption).

134. *See* OKLA. STAT. tit. 10 § 7502-1.4(A) (2008) (prohibiting recognition of adoption decrees entered in other states or countries when the adopting parents are of the same-sex, notwithstanding the seeming mandates of the Full Faith and Credit Clause of the United States Constitution); *see also* Finstuen v. Edmondson, 497 F. Supp. 2d 1295, 1307 (W.D. Okla. 2006) *aff'd in part, rev'd in part sub nom,* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (holding that the statute violated the Full Faith and Credit Clause).

immediately after her death. The following section explores some of the legal issues raised by this innovation.

The status of a man who died before his child was born has long been recognized in the law as a legal father of the posthumous child. Likewise, "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."[135] When cryopreservation of sperm became possible, the law began to accept the potential of post-death conception of a child using the sperm of the deceased father.[136] Research aimed at improving the preservation of eggs, and the current ability to cryopreserve embryos also enhanced the ability of medical science to permit posthumous reproduction.[137] The legal status of a child as an heir of a deceased gamete provider has arisen in a number of cases since the use of cryopreserved gametes has become possible. In the not-always consistent cases involving social security claims by posthumously conceived children, the courts have asked if the deceased father consented to the insemination during his lifetime[138] and if the conception took place reasonably close to the time of his death.[139] California has enacted a statute intended to deal with posthumous reproduction by recognizing a child as that of a deceased parent when that person consented in writing to the posthumous use of his gametes, designated a person who can use them, and the child exists *in utero* in two years or less after the parent's death.[140]

While the problem of posthumous reproduction has generally arisen in regard to paternity, it may at first glance contain a suggestion of how the law and the courts will deal with posthumous maternity. But the difference between posthumous paternity and posthumous maternity must not be ignored. Cryopreservation of eggs has not achieved the practical ease of

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135. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2-108, 9C U.L.A. 363 (2001 & Supp. 2008).

136. *See generally* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent,* 48 A.B.A. J. 942 (1962) (containing the first reference to the potential of posthumous conception).

137. *See* Roosevelt, *supra* note 18, at 85 (discussing the property disputes arising between partners who both contributed to frozen embryos and are claiming ownership).

138. *See* Hecht v. Super. Ct., 20 Cal. Rptr. 2d 275, 289-90 (Cal. Ct. App. 1993) (upholding a deceased man's consent to the postmortem use of his sperm by his girlfriend since he both conveyed it to her by a deed of gift and in his will and it is not contrary to public policy).

139. *See* Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004) (finding that children conceived ten months after a father's death were his legal dependents); Woodward v. Comm'r. of Soc. Sec. Admin. 760 N.E.2d 257, 259 (Mass. 2002) (holding that children conceived sixteen months after a father's death were his legal heirs when evidence showed he consented, agreed to support any posthumous children, and that he was their genetic father). *Contra* Finely v. Astrue, 270 S.W.3d 849 (Ark. 2008); Khabbaz v. Comm'r, Soc. Sec. Admin., 930 A.2d 1108 (N.H. 2007).

140. CAL. PROB. CODE § 249.5 (West 2009).

freezing sperm.[141] It is true that when an egg has been fertilized *in vitro* the resulting zygote (usually called preembryos or just embryos in the case law) can be easily cryopreserved, but unlike the posthumous use of sperm, the resulting entity is the genetic offspring of two persons rather than one, and both of the progenitors have a voice in how it is to be gestated.[142] Posthumous maternity additionally requires the involvement of a third party, i.e. the gestational carrier, whereas a widow or other designated female can confine the posthumous use of sperm to one female.[143] These differences between paternity and maternity cannot be ignored in any analysis of posthumous maternity. In posthumous maternity cases involving eggs and embryos, the cases involving the placement of sperm may provide a roadmap for the courts, but consideration should also be given to gender differences.[144]

The Model Act does not distinguish between posthumous paternity and posthumous maternity. It defines posthumous conception as "the transfer of an embryo or gametes with the intent to produce a live birth after a gamete provider has died."[145] By not making a distinction between male and female gamete providers the Model Act leaves it to the courts to sort out any potential issues arising out of posthumous maternity. Instead, the Act focuses on the need for a deceased gamete provider to have consented in a record[146] to the use of the gamete after his or her death.[147] If a gamete provider dies before placement of the "eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the

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141. *See* Kate Johnson, *ASRM: Egg Cryopreservation Still Experimental; Egg, Ovarian Tissue Cryopreservation Should Not be Marketed to Healthy Women, According to a New Report*, B-NET, Dec. 1, 2004, at 2-3, *available at* http://findarticles.com/p/articles/mi_m0CYD/is_23_39/ai_n8581185/.

142. *See* Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992) (disputing the rights of the husband and wife who had both contributed towards the creation of the embryo).

143. *See, e.g.*, *In re* C.K.G., 173 S.W.3d 714, 716 (Tenn. 2005) (reviewing a maternity dispute where the father was the only one who had a genetic connection to the children that were a result of his sperm but an anonymous egg donor).

144. *Id.*

145. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(30) (2008).

146. *See id.* § 102(33) (defining a record as "information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form").

147. *See id.* § 607 (requiring that in the event that the state has enacted a different provision in a probate code regarding posthumous reproduction, the Model Act will defer to the provision). The National Conference of Commissioners on Uniform State Laws has approved proposed changes in the Uniform Probate Code which under certain, well-defined circumstances would recognize the heirship of a posthumously conceived child. This would require clear consent by the now-deceased parent, that the child is *in utero* within thirty-six months of the parent's death, and that the child is born no later than forty-five months after the parent's death. Proposed UNIF. PROB. CODE, §§ 2-120(f)(2)(C), 2-120(k). Section 2-121(h) of the proposed Code would achieve the same result when a gestational carrier agreement was court-approved. *See* UNIF. PROB. CODE, Art. II, Pt. 1, gen. cmt. (West Supp. 2009).

deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."[148]

It sometimes happens that a request is made for medical personnel to remove gametes from a deceased or incompetent person.[149] The Model Act prohibits such removal unless the person consented in a record during his or her lifetime or period of competence, or the person's authorized fiduciary has express authorization to consent to the removal.[150]

However, a request to collect gametes sometimes comes in an emergency room or medical facility when the donor has died or become incompetent unexpectedly and a record of consent is not immediately available. In such a case, loss of viability of the gamete is likely to occur unless removal takes place immediately. If "a genuine question as to the existence of consent in a record" arises, the gametes or embryos may be removed and preserved.[151] If gametes or embryos are collected in such an emergency situation they may not be transferred to produce a pregnancy "unless approved by a Court."[152]

III. CONCLUSION

It is likely that the use of assisted reproductive technologies will continue to grow in the future, both as a response to the problem of infertility and as a solution for same-sex couples. It is also likely that courts will continue to be called on to decide issues of maternity, especially in cases involving surrogacy where birth motherhood and genetic motherhood are separate. Since few states have statutes governing the consequences of such technology, and those that exist are widely disparate, it is time for legislatures to consider enacting the American Bar

148. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607 (noting that the use of the term "deceased spouse" in this provision reflects a view that posthumous use of gametes or embryos should be used only by a person who is a "legal spouse," i.e., either related to the deceased person by marriage or having a "relationship to another that [the] state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage"); *see also id.* § 102(21) (recognizing a deceased party to a legal marriage, legal civil union, or legal registered domestic partnership as entitled to use the gamete or embryo if the deceased has consented in a record). It may be possible that in future litigation, the restriction of posthumous reproduction to a spouse may be challenged as a denial of a deceased non-spouse's right to consent to posthumous reproduction, but at the time of the drafting of the Model Act, confining legal recognition to a legal "family" was seen as appropriate by the drafters.

149. *See id.* prefatory note (discussing the use of new scientific procedures in reproductive medicine to remove gametes from dead or incapacitated individuals).

150. *Id.* § 205(1).

151. *Id.* § 205(2).

152. *See id.* § 205(3) (creating a "presumption of non-consent" in the absence of a record showing consent).

Association's Model Act Governing Assisted Reproductive Technology or something similar to it. The creation of surrogacy agreements are often multi-jurisdictional transactions, and the absence of law in some states and diversity of laws in other states creates serious problems in the resolution of something as important as determining maternal rights and obligations. Enactment of the Model Act will create a foundation for a more uniform and consistent legal setting, and will ensure a more rational basis for the protection of both the mother and the child who is conceived by assisted reproduction.